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22

23 **UNITED STATES DISTRICT COURT**
24 **NORTHERN DISTRICT OF CALIFORNIA**

25 RONALD KRYZANOWSKY AND
ILEANA KRYZANOWSKY, on behalf
26 of themselves and all others similarly
situated,
27

Case No. C07-05362 SBA

28 Plaintiffs,

1 vs.

2 ORKIN EXTERMINATING COMPANY,
3 INC.; ROLLINS, INC.,

4 Defendants.

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7

JOINT CASE MANAGEMENT
STATEMENT

8 Plaintiffs Ronald and Ileana Krzyzanowsky ("Plaintiffs") and Defendants Orkin
9 Exterminating Company, Inc. (n/k/a Orkin, Inc.) ("Orkin") and Rollins, Inc. ("Rollins")
10 and, together with Orkin, "Defendants"), by and through their undersigned counsel, file
11 this Joint Case Management Statement pursuant to Civil Local Rule 16-9. All parties
12 reserve their rights to supplement or modify this statement as necessary as the case
13 progresses.

14

15 **1. Jurisdiction and Service:**

16 This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because
17 Plaintiffs are citizens of the State of California, Defendants are incorporated in
18 Delaware and have their principal place of business in Georgia, there are more than 100
19 putative members of the putative class, and the amount in controversy exceeds \$5
20 million, exclusive of interest and costs. All parties have been served.

21

22 **2. Facts:**

23 *Plaintiffs' Statement:* Without limitation of the Complaint, Plaintiffs allege that
24 Orkin engages in widespread unfair, unlawful and deceptive practices (and breaches of
25 duties imposed by contracts, law or industry standards) with regard to how it promotes,
26 sells, and services obligations under contracts dealing with prevention of subterranean
27 (ground) termites.

1 Orkin used chemicals it knew wore off over time or which were known to be
 2 ineffective even if properly applied but nonetheless promised "lifetime" protection or
 3 annually renewed promises. Orkin failed to replace or complete chemical barriers, kept
 4 customers in the dark about this failure, and covered up or compounded the wrongdoing
 5 by switching these customers to different contracts, or provided spot treatments which it
 6 said were "complete" treatments. Orkin either continued to collect annual renewal
 7 premiums for its guarantees or switched customers to new contracts for installation of
 8 control systems it falsely and deceptively described as "baits" that would kill all termite
 9 colonies. The system it described as a "baiting system" could not fairly or accurately be
 10 considered a lure for termites.

11 Orkin failed to inspect properties with the frequency or thoroughness that it knew
 12 to be required by sound entomologic practices (and even its own policies) without
 13 disclosing to customers that its non-existent or incomplete inspections failed to include
 14 a quality control program and were not designed to identify problems with the
 15 completeness or effectiveness of chemical barriers or control methodologies.

16 *Defendants' Statement:* Orkin is one of the country's largest pest control
 17 companies and has been recognized for its customer service, training, and technological
 18 innovations. It operates in a highly regulated environment under the direct oversight of
 19 the Structural Pest Control Board. *See Cal. Bus. & Prof. Code 8500 et seq.* The
 20 complaint nevertheless requests that the trier of fact review almost every aspect of
 21 Orkin's work at thousands of properties throughout California over an unspecified
 22 multi-year period. The complaint alleges 25 types of misconduct involving every
 23 aspect of Orkin's subterranean termite business including purported oral and written
 24 representations made to customers, inspection and reinspection practices, efficacy of
 25 termiticides, and quality of treatment and retreatment. (Cmplt. ¶ 38(a) – (y)). Orkin
 26 denies any misconduct to plaintiffs and the putative class they seek to represent.

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1 3. Legal Issues:

2 *Plaintiffs' Statement:* According to the Answer, the following will be at issue:
 3 Liability individually and on a class basis for each of the causes of action alleged in the
 4 complaint; the extent of control and direction of Orkin, its business, and its finances,
 5 assets, and liabilities by Rollins; the proper Division of this Court to hear this case; the
 6 appropriate class definition and whether a class should be certified (presumably for
 7 non-UCL claims); statutes of limitation; arbitration; validity of individual releases by
 8 specific customers; mitigation of damages; comparative negligence of customers; Safe
 9 Harbor provisions of California Civil Code § 1784 relating to statutory claims; failure
 10 of notice to Orkin under California Civil Code § 1782 (Consumers Legal Remedies
 11 Act); federal preemption by the Federal Insecticide, Fungicide, and Rodenticide Act
 12 (FIFRA); scope and applicability of the "economic loss rule" for non-contract claims.

13 *Defendants' Statement:* There are numerous legal issues relating to the merits of
 14 the case, including the issue of whether the plaintiff has standing to sue and the
 15 limitation of liability contained in Plaintiff's contract with Orkin. The threshold issue
 16 in this action, however, is whether class certification is appropriate under Fed. R. Civ.
 17 P. 23. It is Defendants' position that the requested class is not certifiable because, *inter*
 18 *alia*, individual issues predominate and a class action would not be a superior method
 19 for resolving individual claims. Plaintiffs challenge the quality and efficacy of Orkin's
 20 services at every property treated by Orkin throughout the entire state of California.
 21 There is no common body of evidence that could be used to try the claims of potentially
 22 thousands of class members. Nor would a trial on the claims of the named plaintiffs
 23 permit the trier of fact to draw any inferences about Orkin's performance at potentially
 24 thousands of other properties throughout California. Whether Orkin complied with its
 25 contractual obligations at a particular property would require a file-by-file and
 26 property-by-property review and inspection involving experts in structural pest control,
 27 entomology, and construction.

28 ///

1 **4. Motions:**

2 No motions are currently pending.

3

4 **5. Amendment of Pleadings:**

5 The parties do not currently anticipate the addition of any parties. In paragraph
6 17, the parties have set out their separate scheduling proposals, each of which include a
7 deadline for amendment of pleadings.

8

9 **6. Evidence Preservation:**

10 *Plaintiffs' Statement:* Counsel advised the individual Plaintiffs of their duty to
11 preserve evidence and copies of discoverable materials have been copied.

12 *Defendants' Statement:* Defendants have distributed a Document Preservation
13 Notice to approximately 75 individuals and entities, both internal and external to
14 Rollins and Orkin, at corporate, regional, and branch office levels, requiring the
15 preservation of documents that relate to the subject matter of this litigation. In doing
16 so, "document" was defined broadly to include both paper materials and electronically-
17 stored information. Applicable document destruction programs have been suspended as
18 to these documents. Snapshots have been taken of potentially applicable databases or
19 software programs, including but not limited to those relating to customer service and
20 treatment, customer complaints, inspections, claims, risk management, and personnel.
21 Network email users have been instructed to establish a separate folder, saved to the
22 network and backed-up periodically, for any emails, regardless of date, that relate to the
23 subject matter of this litigation.

24

25 **7. Disclosures:**

26 The parties have discussed their initial disclosures at three separate conferences
27 and have agreed that initial disclosures will be served and filed on March 14, 2008.
28 The parties disagree on the scope of Defendants' initial disclosures:

1 *Plaintiffs' Statement:* See Plaintiffs' Statement in Paragraph 8, below.

2 *Defendants' Statement:* Defendants have requested that the parties forego initial
 3 disclosures and immediately commence with written discovery on a coordinated basis
 4 with the Arkansas litigation identified below in paragraph 10. Plaintiffs' counsel have
 5 litigated against Orkin extensively in the past in other jurisdictions and are familiar with
 6 the company and its documents. (Indeed, they already have tens of thousands of pages
 7 of documents, many of which plaintiffs may use in this action, subject to further
 8 negotiation and the entry of an appropriate protective order.) Thus, initial disclosures
 9 would appear to be unnecessary. Plaintiffs rejected that proposal. The parties,
 10 therefore, have agreed to make initial disclosures on March 14, 2008 based on the
 11 individual claims of the named plaintiffs.

12 The parties dispute, however, the scope of the initial disclosures. Plaintiffs
 13 contend that the disclosures should include witnesses and documents necessary for
 14 defendants to defend this action as if a class had been certified. Fed. R. Civ. P. 26 does
 15 not require that the initial disclosures be made based on how the case may look in a
 16 year or two in the event that a class were certified but, rather, it requires the parties to
 17 address the case based on the parties before the Court at this juncture. Absent class
 18 members are not before the Court and may never be before the Court unless and until a
 19 class is certified. Moreover, it would be overly burdensome at this early stage of the
 20 litigation to require Orkin to review and identify any and all individuals or documents
 21 that may be used to support its defenses against *all* of the thousands of putative class
 22 members. Thus, initial disclosures limited to the defenses against the plaintiffs'
 23 individual claims are sufficient. Plaintiffs have agreed that defendants can make their
 24 initial disclosures based on their defenses of the named plaintiffs' claims pending a
 25 motion by plaintiffs to enlarge the scope of the disclosures and the Court's entry of an
 26 order on such a motion.

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28 ///

1 **8. Discovery:**

2 No discovery has been taken to date and the parties disagree on the scope of
 3 discovery. It is plaintiffs' position that discovery proceed on all issues immediately and
 4 it is defendants' position that discovery should focus initially on class certification and
 5 plaintiffs' suitability as class representatives. However, the parties agree that it would
 6 be appropriate for the Court to enter a mutually agreeable protective, which the parties
 7 are now negotiating and anticipate lodging for this Court's approval the first week of
 8 March.

9 *Plaintiffs' Statement:* Discovery should not be bifurcated. As with many cases
 10 where predominance is going to be contested, if discovery is bifurcated, there will be
 11 many disputes over whether discovery is merits based or class based. Therefore,
 12 bifurcated discovery will only serve to delay this cause, repeat efforts, and cause
 13 unnecessary expense on all parties.

14 No discovery has been taken to date. Initial disclosures have not yet been made.
 15 Orkin seeks to imply that Plaintiffs' counsel already has tens of thousands of documents
 16 to prove their case; therefore, initial disclosures are not warranted. This is not true.
 17 Plaintiffs' counsel has litigated against Orkin in Alabama, not California. Orkin
 18 previously produced documents concerning subterranean termite services in Alabama
 19 under Alabama regulations but not California regulations. Moreover, those previous,
 20 individual Alabama cases did not involve UCL or 17500 claims, advertising, marketing,
 21 or "Safe Harbor," "Preemption," or class action claims or defenses as asserted here.
 22 Those Alabama cases involved individuals and the bulk of discovery concerned
 23 personnel files of those involved in the Alabama cases and fraud pattern customer files
 24 as well as third-party subpoena and expert files concerning an apartment complex,
 25 individual homes, and local, Alabama Orkin branches and their particular internal
 26 quality audits and controls. The Alabama cases also contained little to no discovery
 27 related to Orkin's computer systems. Therefore, were Plaintiffs to go to trial today
 28

1 using only the Alabama evidence, Plaintiffs would be at an unfair disadvantage, not
 2 contemplated by the Rules.

3 Initial Disclosures of documents and things that relate to claims and defenses
 4 must be required. Orkin seeks to suspend the rule relating to such disclosures despite
 5 the fact that the Rules give Orkin no such choice. While Plaintiffs have agreed that
 6 Orkin should not be required to identify overlapping documents (mostly national policy
 7 and procedure manuals) already produced in other litigation to Campbell Law if it will
 8 agree those may be utilized in this case, Plaintiffs' counsel does not believe Orkin has
 9 fully complied with discovery requests in those other cases. For example, Orkin
 10 frequently changes and supplements its internal documents much like a supplement to a
 11 legal treatise or case reporter. Orkin keeps a library of these items in Atlanta and
 12 elsewhere. One change to Orkin's form inspection tickets occurred during and as a
 13 result of Alabama litigation by Campbell Law so that Orkin would be in compliance
 14 with Alabama Regulations. Likewise, Plaintiffs should not be left to guess at what
 15 Orkin has that relates to its numerous and broadly stated denials and defenses. For
 16 example, Orkin defends on the basis of "Safe Harbor" and "Preemption." Orkin must
 17 identify facts relating to those defenses. No discovery has ever been received by
 18 Plaintiffs' counsel concerning such issues.

19 Plaintiffs request that each side be allowed up to 20 fact depositions, 10
 20 depositions of retained experts, and 100 interrogatories without leave of court.

21 *Defendants' Statement:* It is Defendants' position that discovery at this juncture
 22 should focus on documents and information related to whether the claims asserted by
 23 the named plaintiffs are subject to certification pursuant to Fed. R. Civ. P. 23 and Cal.
 24 Code Civ. Proc. Section 382. This includes discovery into the adequacy of the named
 25 plaintiffs as putative class representatives, an issue defendants did not concede in their
 26 answer. Such discovery into adequacy of plaintiffs and their counsel should be neither
 27 lengthy nor burdensome.

28 ///

1 Plaintiffs also contend that merits discovery should proceed because there will be
 2 disputes about the proper line between merits and class discovery. Courts draw that
 3 line routinely and it should be no more difficult to resolve than any other discovery
 4 dispute.

5 Prior to a decision on plaintiffs' motion for class certification, discovery should
 6 be modified as follows: (1) 10 depositions per side, with no deposition exceeding 7
 7 hours absent good cause shown; (2) 20 interrogatories, including subparts, per side; (3)
 8 30 requests to admit per side; and (4) 30 requests for production of documents per side.

9 Defendants also propose that the discovery period for the putative class be
 10 limited in time to the four years prior to the filing of the Complaint. Although the class
 11 period provides no relevant time period, the applicable statutes of limitations make four
 12 years a reasonable period for discovery purposes.

13

14 **9. Class Actions:**

15 The parties disagree on a schedule related to class certification discovery,
 16 briefing, and oral arguments. The parties have included class certification proceedings
 17 in the schedules submitted in paragraph 17.

18

19 **10. Related Cases:**

20 Two of the plaintiffs' counsel in this case have filed an action styled *Roy*
 21 *Sheppard v. Orkin Exterminating Co., Inc. and Rollins, Inc.*, in the Eastern District of
 22 Arkansas (Case No. 4-07-cv-01183) that raises substantially similar allegations. The
 23 *Sheppard* plaintiffs are represented by the Tom Campbell Firm (Birmingham, AL) and
 24 the firm of Richardson, Patrick, Westbrook & Brickman (Charleston, SC), both of
 25 whom also represent the plaintiffs in this case. Defendants request that discovery in the
 26 two actions proceed on the same schedule so that documents and witnesses are only
 27 produced once.

28 // /

1 **11. Relief:**

2 *Plaintiffs' Statement:* Plaintiffs seek compensatory, equitable, statutory and
 3 punitive damages, plus costs and attorney fees, plus interest. Precise amounts are not
 4 capable of determination at this time.

5 *Defendants' Statement:* Plaintiffs seek compensatory, incidental, and
 6 consequential damages. Proof of such damages would require a factual investigation
 7 into Orkin's course of treatment at the Krzyzanowsky property since 1999 and the
 8 existence of any actual termite damage resulting from Orkin's alleged conduct.
 9 Typically, such an investigation requires an on-site property inspection by an expert in
 10 structural pest control methods, entomology, and/or construction. Because plaintiffs
 11 have not identified any specific categories of incidental or consequential damages,
 12 Orkin cannot identify the proof that would be necessary to rebut such claims. For
 13 example, if plaintiffs are seeking diminished market value as a quantum of damages,
 14 experts in the local real estate market would be needed to testify about the real estate
 15 market in which the Krzyzanowsky property sits.

16

17 **12. Settlement and ADR:**

18 On January 2, 2008, Defendants filed a Notice of Need for ADR Conference.
 19 Plaintiffs and Defendants each filed an ADR Certification By Parties and Counsel
 20 pursuant to Civil L.R. 16-8(b) and ADR L.R. 3-5(b).

21

22 **13. Consent to Magistrate Judge For All Purposes:**

23 All parties have not consented to having a magistrate judge conduct all further
 24 proceedings in this case.

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1 **14. Other References:**

2 The parties believe it is too early in the proceedings to determine whether this
 3 case is suitable for reference to binding arbitration, a special master, or the Judicial
 4 Panel on Multidistrict Litigation.

5

6 **15. Narrowing of Issues:**

7 The parties agree that this Court should, as a threshold matter, determine whether
 8 class certification is appropriate in this case.

9

10 **16. Expedited Schedule:**

11 Given the parties' agreement that class certification should be determined as a
 12 threshold matter, the parties agree that it is too early to determine whether this case can
 13 be handled on an expedited basis with streamlined procedures.

14

15 **17. Scheduling:**

16 The parties generally agree that class certification should be decided first and a
 17 schedule for additional dates beyond that should be deferred until after a decision on
 18 class certification. The parties, however, do not agree on the appropriate class
 19 certification schedule and present their alternative proposals below:

20 Due to the nature of class action cases, the parties jointly propose limiting the
 21 scheduling order through class certification, but propose different interim schedules.

22 ***Plaintiffs' Proposed Schedule:***

23 Plaintiff disclosure of experts:	9/25/08
24 Plaintiff Expert Depositions:	10/31/08
25 Defendant disclosure of experts:	10/31/08
26 Close of expert discovery:	11/30/08
27 Preliminary Discovery Completion:	12/30/08
28 Class Certification Motion:	01/15/09

1 Opposition to Class Motion: 02/15/09
 2 Reply to Opposition: 03/01/09
 3

4 ***Defendants' Proposed Schedule:***

5 Parties to serve all written discovery: 4/1/08
 6 Deadline for Plaintiffs to make 4/15/08
 7 property available for inspection:
 8 Deadline for depositions of Plaintiffs: 4/30/08
 9 Deadline for amending the pleadings 6/16/08
 10 and to add new parties:
 11 Written discovery cutoff prior to class 9/1/08
 12 certification; No additional written
 13 discovery re: class certification absent
 14 good cause:
 15 Plaintiffs to make class expert disclosures 9/25/08
 16 pursuant to Fed. R. Civ. P. 26:
 17 Plaintiffs to make class experts available 10/9/08
 18 for deposition by this date:
 19 Deadline for non-expert depositions: 10/31/08
 20 Defendants to make class expert 11/13/08
 21 disclosures pursuant to Fed. R. Civ. P. 26:
 22 Defendants to make class experts 12/4/08
 23 available for deposition by this date:
 24 Plaintiffs' motion for class certification, 1/15/09
 25 supporting memorandum, and all
 26 supporting evidence:
 27 Defendants' opposition to motion for 2/13/09
 28 class certification, supporting
 29 memorandum, and all supporting evidence:
 30 Plaintiffs' reply brief in support of 2/27/09
 31 motion for class certification:
 32

1 **18. Trial:**

2 The parties agree that, if class certification is granted, this case will be tried to a
 3 jury. The parties disagree as to the expected length of trial.

4 *Plaintiffs' Statement:* A jury trial has been demanded. The length of trial is
 5 expected to be four (4) to six (6) weeks at this time.

6 *Defendants' Statement:* It is too early to reasonably predict the length of any
 7 trial, which will depend on whether the Court certifies a class. If class certification is
 8 denied, the trial on plaintiffs' claims should take five to ten trial days. If a class is
 9 certified, defendants anticipate that any trial would last at least four to six months, at a
 10 minimum, not including an indeterminate amount of time for mini-trials on individual
 11 issues. A trial of a certified class's claims could last several years, depending on the
 12 ultimate class definition and the claims that are certified for class treatment.

13

14 **19. Disclosure of Non-Party Interested Entities or Persons:**

15 *Plaintiffs' Statement:* All California consumers who purchased subterranean
 16 (ground) termite services from Defendants.

17 *Defendants' Statement:* On December 3, 2007, Defendants filed their
 18 Certification of Interested Entities or Persons, certifying that the following listed
 19 persons, associations of persons, firms, partnerships, corporations (including parent
 20 corporations) or other entities (i) have a financial interest in the subject matter in
 21 controversy or in a party to the proceeding; or (ii) have a non-financial interest in that
 22 subject matter or in a party that could be substantially affected by the outcome of this
 23 proceeding; or (iii) are publicly-traded companies that own 10% or more of a party's
 24 stock:

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1 Dated: February 29, 2008

HOFFMAN & LAZEAR
H. Tim Hoffman
Arthur W. Lazear
Morgan M. Mack

9 Dated: February 29, 2008

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Mark L. Eisenhut
Matthew R. Orr

13 By: s/Matthew R. Orr
Matthew R. Orr

15 Attorneys for Defendant Orkin Exterminating
16 Company, Inc. (n/k/a Orkin, Inc.) and Rollins,
17 Inc.

28

1 **CERTIFICATE OF SERVICE**
 2 (United States District Court)

3 I am employed in the County of Orange, State of California. I am over the age of
 4 18 and not a party to the within action; my business address is 610 Newport Center
 5 Drive, Suite 700, Newport Beach, CA 92660.

6 On February 29, 2008, I have served the foregoing document described as
 7 **JOINT CASE MANAGEMENT STATEMENT** on the following person(s) in the
 manner(s) indicated below:

8 **SEE ATTACHED SERVICE LIST**

10 (BY ELECTRONIC SERVICE) I am causing the document(s) to be served on
 11 the Filing User(s) through the Court's Electronic Filing System.

12 (BY MAIL) I am familiar with the practice of Call, Jensen & Ferrell for
 13 collection and processing of correspondence for mailing with the United States Postal
 14 Service. Correspondence so collected and processed is deposited with the United States
 15 Postal Service that same day in the ordinary course of business. On this date, a copy of
 16 said document was placed in a sealed envelope, with postage fully prepaid, addressed as
 17 set forth herein, and such envelope was placed for collection and mailing at Call, Jensen
 18 & Ferrell, Newport Beach, California, following ordinary business practices.

19 (BY OVERNIGHT SERVICE) I am familiar with the practice of Call, Jensen &
 20 Ferrell for collection and processing of correspondence for delivery by overnight
 21 courier. Correspondence so collected and processed is deposited in a box or other
 22 facility regularly maintained by the overnight service provider the same day in the
 23 ordinary course of business. On this date, a copy of said document was placed in a
 24 sealed envelope designated by the overnight service provider with delivery fees paid or
 25 provided for, addressed as set forth herein, and such envelope was placed for delivery
 26 by the overnight service provider at Call, Jensen & Ferrell, Newport Beach, California,
 27 following ordinary business practices.

28 (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the
 29 transmittal sheet, I transmitted from a facsimile transmission machine, which telephone
 30 number is (949) 717-3100, the document described above and a copy of this declaration
 31 to the person, and at the facsimile transmission telephone numbers, set forth herein.
 32 The above-described transmission was reported as complete and without error by a
 33 properly issued transmission report issued by the facsimile transmission machine upon
 34 which the said transmission was made immediately following the transmission.

27 (BY E-MAIL) I transmitted the foregoing document(s) by e-mail to the
 28 addressee(s) at the e-mail address(s) indicated.

1
2 [X] (FEDERAL) I declare that I am a member of the Bar and a registered Filing User
for this District of the United States District Court.

3
4 I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct, and that this Certificate is executed on February
29, 2008, at Newport Beach, California.
5

6 s/Matthew R. Orr
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